STATE OF CALIFORNIA

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August 31, 1993

Mr. Fred Forbeck
Chief Appraiser
Sonoma County Assessor's Office
585 Fiscal Drive, Room 104F
Santa Rosa, CA 95403-2872

Dear Mr. Forbeck:

Your letter of March 10, 1993 to Mr. Charlie Knudsen has been referred to us with the request that we respond directly to you with our opinion as to whether a taxable possessory interest was created as result of one or more agreements for the use of the Sonoma County Fairgrounds (Facility) by Simulcast Enterprises (Simulcast) to conduct satellite wagering. Our opinion is, therefore, limited to that issue. Soon after we received your letter, the taxpayer's attorney, Mr. Jon Schorr, wrote us requesting the opportunity to present their views. Mr. Schorr has now done so in his letter to us of June 30, 1993.

Background

In 1985, the California Horse Racing Law was amended to permit parimutuel wagering on racing at another racing facility via satellite broadcast. These facilities include county fairgrounds such as the Facility in this case.

In order to facilitate such satellite wagering, Simulcast was formed in 1985 as a joint venture. The joint venture members during most of the period in question were Bay Meadows Racing Association and Pacific Racing Association both of which are California corporations referred to hereafter as the Host or Hosts. Hosts have designated Simulcast as their agent to operate satellite wagering at the Facility. Simulcast has operated satellite wagering at the Facility from October 1985 until the end of May 1992.

You have provided us with copies of two agreements between Simulcast, Hosts, and Sonoma County Fair (Guest). One is for the period September 15, 1987 to January 15, 1990 (Agreement 1) and the other for the period January 25, 1990 to June 1, 1992 (Agreement 2).

Law and Analysis

Article XIII, section 1, of the California Constitution requires that all property be taxed unless otherwise provided by the California Constitution or the laws of the United States. Possessory interests in real property are deemed to be real property for tax purposes. (Forster Shipbldg. Co. v. County of L.A. (1960) 54 Cal.2d 450, 455.) Also, Revenue and Taxation Code section 104 classifies the right to use or possess land as real property. Section 107 defines "possessory interests" in pertinent part as "[p]ossession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person."

Property Tax Rule 21, is the Board's interpretation of section 107 and provides in relevant part:

(a) "Possessory interest" means an interest in real property which exists as a result of possession,[1] exclusive use,[2] or

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[1](c) "Possession" means: (1) Actual possession, constituting the occupation of land or improvements with the intent of excluding any occupation by others that interferes with the possessor's rights, or (2) Constructive possession, which occurs when a person, although he is not in actual possession of land or improvements, has a right to possession and no person occupies the property in opposition to such right. (Property Tax Rule 21.)

[2](e) "Exclusive use" means the enjoyment of a beneficial use of land or improvements, together with the ability to exclude from occupancy by means of legal process others who interfere with that enjoyment. Co-tenants may each make such use of land or improvements without impairing the other's right to use the property, as this constitutes but a single use jointly enjoyed. Exclusive use is not destroyed by one or more of the following: (1) Multiple use by persons making different uses of the same property in such a manner that they do not prevent the enjoyment of co-existing rights held by others, as for example, the development of mineral resources by one person and the enjoyment of recreational uses by others; (2) Concurrent use when the extent of each party's use is limited by the other party's right to use the property at the same time, as, for example, when two or more

> a right to possession or exclusive use of land and/or improvements unaccompanied by the ownership of a fee simple or life estate in the property. Such an interest may exist as the result of:
>
> (1) A grant of a leasehold estate, an easement, a profit a prendre, or any other legal or equitable interest of less than freehold, regardless of how the interest is identified in the document by which it was created, provided the grant confers a right of possession or exclusive use which is independent, durable, and exclusive of rights held by others in the property;...
>
> (b) "Taxable possessory interest" means a possessory interest in nontaxable publicly owned real property....

In addition to the requirements of independence, durability and exclusiveness, the courts have also required that the right of possession or exclusive use must confer a private benefit. See e.g., Cox Cable San Diego, Inc. v. County of San Diego (1986) 185 Cal.App.3d 368, 377.

The rationale behind the taxation of possessory interests is that "[t]hese possessions...are recognized as a species of property subsisting in the hands of the citizen. It is not the land itself, nor the title to the land....It is not the preemption right, but is the possession and valuable use of the land subsisting in the citizen. Why should it not contribute its proper share, according to the value of the interest,...of the taxes necessary to sustain the Government which recognizes and protects it?" (People v. Shearer (1866) 30 Cal. 645, 657.)

The following statement by the Court of Appeal aptly summarizes the approach taken by the courts:

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parties each have the independent right to graze cattle on the same land; (3) Alternating use when the duration of each party's use is limited, as, for example, the use of premises by a professional basketball team on certain days of each week and by a professional hockey team on certain other days; (4) persons lawfully passing over or taking things from the land; (5) the existence of noninterfering easements, covenant rights, or servitudes in other persons or attached to other lands; (6) Occasional trespassers. (Property Tax Rule 21.)

> In light of the decisional law which more than a century ago recognized the concept of a possessory interest tax, coupled with the broad statutory language defining possessory interests, a valuable and taxable possessory interest may be found in virtually any situation where a private citizen is allowed to use public property for personal gain. (Scott-Free River Expeditions, Inc. v. County of El Dorado, (1988) 203 Cal.App.3d, 896, 903.)

In determining the existence of a taxable possessory interest under a written instrument, an objective standard rather than the literal language of the written instrument controls in ascertaining the nature of the relationship established. Because of the variety of interests that may be created by written instruments, the question of whether a taxable possessory interest has been created must be decided on a case-by-case basis by weighing the factors of durability, exclusiveness, private benefit and independence. In each case, judgment is to be made by an examination of the writing in its entirety. (Stadium Concessions, Inc. v. City of Los Angeles, (1976) 60 Cal.App.3d 215; Wells National Services Corp. v. County of Santa Clara, (1976) 54 Cal.App.3d 579; Mattson v. County of Contra Costa, (1968) 258 Cal.App.2d 205; see also Property Tax Rule 21(a)(1) *supra*). In order to determine whether a taxable possessory interest has been created in this case, it is necessary to analyze the Agreements in light of the standard set forth above.

Durability

To satisfy the requirement of durability, the agreement must confer use for a determinable period and the use has to be reasonably certain to last for that period. (Kaiser v. Reed (1947) 30 Cal.2d 160.)

More recently the Court of Appeal has stated that "the protax trend has found courts testing the requirement of a reasonably certain period of enjoyment by an examination of the agreement as stated in writing and the history of the relationship of the parties, thereby finding durability because of the passage of time even though the agreement may have been cancelable at the will of the parties." Freeman v. County of Fresno (1981) 126 Cal.App.3d 459, 463.

Under Paragraph 1 of both Agreements, Guest granted Simulcast the exclusive right (a) to broadcast a televideo signal to the Facility of races conducted by Hosts and other racing

events for purposes of satellite wagering at the Facility; (b) to furnish equipment required for such broadcast, the coding and decoding of the televideo signal; and (c) to operate parimutuel wagering at the Facility on such racing events. Paragraph 4 of the Agreements required Guest to provide at the Facility, among other things, (f) reasonable office space and furnishings to house Simulcast's on-site wagering department, including supervisory and administrative personnel, as well as parimutuel wagering windows required by Simulcast for the purpose of conducting satellite wagering.

Further, Paragraph 12 specifically provides that Simulcast and each Host and employees, agents and independent contractors employed by them in connection with the performance of their duties under the Agreements shall be permitted access to the Facility for the purpose of conducting and supervising parimutuel wagering and for the purpose of installing, maintaining and repairing equipment necessary for conducting parimutuel wagering and to decode and receive the television signal from the Host via satellite.

Simulcast's use of the Facility as described above continued from October 1985 until the end of May 1992, a period of nearly seven years. Such a period is of more than sufficient duration to satisfy the factor of durability. (Mattson v. County of Contra Costa, *supra*, 258 Cal.App.2d at p. 211.)

The factor of durability is clearly satisfied here.

Private Benefit

The requirement of private benefit is met if there is an opportunity for the holder of the interest to make a profit. (Wells Nat. Service Corp. v. County of Santa Clara, *supra*, 54 Cal.App.3d at p. 585.)

However, the absence of an opportunity for the holder of the interest to make a profit does not necessarily mean that the use or possession confers no private benefit. For example, in Rand Corp. v. County of Los Angeles, (1966) 241 Cal.App.2d 585, the taxpayer, a nonprofit corporation suggested that it should be excused from taxability upon its possessory rights in tax exempt federally owned improvements because of its status as a nonprofit corporation. The Court of Appeal disagreed stating that "[t]he people who compose Rand have a purpose in making use of government property and the opportunity to accomplish that purpose could well be worth more to them than mere financial

gain." (Rand, *supra*, at p. 590; see also McCaslin v. DeCamp, (1967) 248 Cal.App.2d 13.)

Here, Mr. Schorr cites Business and Professions Code section 19605.7 for the proposition that Simulcast is prohibited from making a profit. That section limits Simulcast's share of the distribution from parimutuel wagering at the Facility to reimbursement of its actual operating expenses or a statutory percentage (currently 2-1/2%) of such parimutuel wagering whichever is less.

As indicated above, a profit element is not necessarily required in order to obtain a private benefit from the use of public property. Section 19608.2 permits the formation of organizations like Simulcast by associations like Hosts to operate the audiovisual signal system "[i]n order to permit associations providing audiovisual signals the ability to do without undue burden and expense, to avoid unnecessary duplication of facilities, to permit the associations to protect the security of their signals, and to permit the associations to protect the integrity of their parimutuel pools and to account for wagering proceeds included in those parimutuel pools...."

Section 19608.2 constitutes legislative recognition of the purposes for which organizations like Simulcast are formed. As in the Rand case, the people who compose Simulcast (and Hosts) had an opportunity to accomplish these purposes and thus benefit through the use of the Facility whether or not such benefit was financial. Paragraph 10 of both Agreements confirmed that the purpose of the Agreements was "solely for the benefit of the parties" thereto, i.e., Simulcast, Hosts, and Guest. Guest, of course, benefitted primarily because of its contractual and statutory rights to retain two percent of the satellite wagering it handles as a commission. (Par. 5; Bus. & Prof. Code §19605.7)

Paragraph 10 of Agreement 1, however, also gave Simulcast the exclusive right to supply and sell at the Facility racing programs covering races conducted by a Host on each day on which satellite wagering is being conducted at the Facility by Simulcast and to receive and retain, or otherwise direct the disposition of all revenues derived from the sale of such programs. Agreement 2 continued this arrangement for Simulcast and/or the operating Host. Both Agreements gave Simulcast the exclusive right to establish sales prices for the programs and provided that Guest was to receive no income from the sale of the programs. Thus, Paragraph 10 clearly provided Simulcast and/or each Host with the opportunity to make a profit as a result of Simulcast's use of the Facility.

Further, Paragraph 13 of Agreement 1, required Guest to pay administrative and rights fees to Simulcast computed as described in Exhibit B of Agreement 1. Agreement 2 did not continue this requirement of Guest.

Moreover, Paragraph 8 of the Agreements indicates, and Mr. Schorr concedes on page 8 of his letter, that the Hosts were financially benefitted here because satellite wagering at the Facility increased the total Host commissions. Mr. Schorr argues, however, that the value of this benefit to the Hosts is properly included in the valuation of the Hosts' facilities under the income approach and that by assessing a possessory interest to Simulcast, the Sonoma County Assessor has created a situation in which the same value is impermissibly taxed twice.

Under Proposition 13, it is unlikely that the market value of Hosts' real estate facilities would include the value of any benefit from satellite wagering at the Facility unless a change in ownership of Hosts real estate facilities occurred after Simulcast began conducting satellite wagering. Moreover, even if the value of the benefit of satellite wagering at the Facility were included in the valuation of the Hosts' facilities, no double taxation would occur here. Double taxation occurs only when two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority within the same jurisdiction during the same taxing period. (Russ Building Partnership v. San Francisco (1988) 199 Cal.App.3d 1496, 1509.) That test is not met here.

Further, to assess the value of any possessory interest resulting from satellite wagering at the Facility in the value of the Host's real property (which is lcoated outside Sonoma County) would violate the requirement of Article 13, section 14 of the California Constitution that all locally assessed property shall be assessed in the county in which it is situated. "It is plainly the general policy of the law that property situated in one county...should be taxable in that county...for local purposes for its actual value, and that that subdivision alone should have the benefit of this value for the purpose of raising its revenue." San Francisco etc. Ry. Co. v. Scott (1904) 142 Cal. 222, 229.

For the reasons discussed above, we believe the factor of private benefit is satisfied.

Exclusiveness

The test for exclusiveness is not exclusive possession against all the world including the owner. (Wells Nat. Service Corp. v. County of Santa Clara; *supra*, 54 Cal.App.3d at p. 584.) The right of use, however, must carry with it the degree of exclusiveness necessary to give the user something more than a right in common with others. (United States of America v. County of Fresno, *supra,* 50 Cal.App.3d at p. 658.)

To be exclusive, such use "must not be one shared by the general public and, at least until canceled, must be enforceable against the public entity which permits the use." (Freeman v. County of Fresno, *supra*, 126 Cal.App.3d at pp. 463, 464; see also Property Tax Rule 21(e), *supra*.)

As stated by the Court of Appeal in County of Los Angeles v. County of Los Angeles Assessment Appeals Board (1993) 13 Cal.App.4th 102, 111:

> In recent years there has been much litigation concerning the nature and degree of "exclusivity" of use necessary to create a possessory interest. The consistent trend of decisions has been to favor assessors' claims by holding that possessory interests may arise from limited or concurrent exclusive uses, so long as they involve a grant of rights not shared by the general public. (Citation omitted.) But none of these holdings impairs or retreats from the basic principle that, just as possessory interests are a species of taxable property, the possession or use which grounds them means and requires not just some benefit from the public property, but physical possession or use of it.

Here, the rights granted to Simulcast under the Agreements clearly were not shared by the general public and were enforceable against Guest. (Paragraphs 1, 2, 17, and 18 of both Agreements.) Although Simulcast did share its operations at the Facility with other operators, such sharing, even if concurrent, would not destroy the factor of exclusiveness but, however, would be relevant to valuation of the interest. (Euro-Pacific v. County of Alameda (1992) 11 Cal.App. 4th 891; Scott-Free River Expeditions, Inc. v. County of El Dorado, supra, 203 Cal.App. 3d 896; Lucas v. County of Monterey (1977) 65 Cal.App.3d 947; Board of Supervisors v. Archer (1971) 18 Cal.App.3d 717.)

Accordingly, the factor of exclusiveness is satisfied here.

Independence

To qualify as a possessory interest, the right to use property must be sufficiently exclusive, durable and independent of the public owner to constitute more than an agency. (Pacific Grove-Asilomar Operating Corp. v. County of Monterey (1974) 43 Cal.App.3d 675, 684.)

In the Pacific Grove case, the Court found that an agency was created by the agreement there in question. That decision is the only possessory interest case we are aware of in which an appellate court has concluded that an agency relationship existed.

The court concluded that Asilomar's management of the property was not independent, but subject to state control in every way. The court noted, however, that "the fact that the relationship between Asilomar and the state has no profit motive is an element material in determining the nature of Asilomar's interest." (Asilomar was a nonprofit corporation organized and established solely to manage the state-owned conference grounds in question and derived no private benefit from its management of the property.) The court also noted that Asilomar did not have exclusive use of the property since the property was open to the general public. In the commercial setting involved in Mattson v. County of Contra Costa, *supra*, 258 Cal.App.2d 205, however, such public access (to the dining area of a public golf course operation) was held not to detract from the element of exclusiveness of possession. (Mattson, supra, at p. 210.)

This case is clearly distinguishable from the Pacific Grove case in that Simulcast is not a nonprofit corporation but instead is a joint venture which, by definition, exists for profit making purposes. (Weiner v. Fleischman, (1991) 54 Cal.3d 476.) Similarly, Simulcast as well as Hosts had the opportunity to profit financially as a result of their use of the Facility as indicated above. Moreover, the management agreement in the Pacific Grove case, listed 25 state controls which, along with the nonprofit aspect of the operation, led to the court's conclusion that an agency relationship existed. Few such controls exist here.

Furthermore, Paragraph 28 of the Agreements provides that Simulcast and its agents and employees, in the performance of their obligations under the Agreements, "shall act independently and not as officers or employees or agents of the State of California." (Emphasis added.) In fact, rather than Simulcast being an agent of Guest, the Hosts designated Simulcast as their

agent to operate satellite wagering at the Facility under Recital C of Agreement 1.

In our view, Simulcast's operation here was much too autonomous for it to be considered an agent of Guest and the factor of independence is satisfied.

Finally, even if Simulcast's independence were questionable here, there is authority to the effect that in a profit seeking operation which is the case here, independence from public control is not a key to taxability. (Freeman v. County of Fresno, *supra*, 126 Cal.App.3d at p. 465.)

In summary, we believe that Simulcast's use or possession of the Facility meets the requirements of durability, exclusiveness, private benefit and independence to a degree sufficient to reasonably conclude that a possessory interest existed under the terms of the Agreements.

The views expressed in this letter are, of course, only advisory in nature. They are not binding upon the assessor of any county.

Our intention is to provide timely, courteous and helpful responses to inquiries such as yours. Suggestions that help us to accomplish this goal are appreciated.

Very truly yours,

Eric F Eisenlauer

Eric F. Eisenlauer
Senior Staff Counsel

EFE:ba

cc: Mr. John Hagerty
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